No. 92-1856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF LADUE, *et al.*,

Petitioners,

—v.—

MARGARET P. GILLEO,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*

The Association of National Advertisers, Inc., (A.N.A.) respectfully submits this brief *amicus curiae* in support of respondent. Letters of consent to its filing have been lodged with the Clerk of the Court.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's principal community of

commercial speakers, A.N.A. has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

Ordinarily, as in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S.Ct. 1505 (1993), A.N.A. has appeared as *amicus curiae* to urge that commercial speech be accorded an appropriate level of free speech protection. In this case, the City of Ladue has reversed the usual order of speech regulation by treating commercial speech more favorably than non-commercial communication. While A.N.A. applauds Ladue's recognition of the importance of commercial speech, A.N.A. continues to believe that it is constitutionally impermissible for government to differentiate among categories of speech on the basis of content in the absence of an overwhelming social need. Moreover, where, as here, a municipality seeks to eliminate a long-established and pervasive means of communication -- the display of signs and symbols on private property -- in the name of aesthetics, the municipality threatens both commercial and non-commercial speech. Accordingly, A.N.A. respectfully submits this brief *amicus curiae* in support of respondent.

STATEMENT OF THE CASE

On December 8, 1990, respondent, a resident of the City of Ladue, placed a small sign on her front lawn reading "Say No to War in the Persian Gulf/Call Congress Now." Vandals immediately destroyed the sign. On December 10, respondent placed an identical sign on her lawn. (A picture of respondent's second sign appears in the Joint Appendix, hereafter J.A., at 194.) When her sign was again destroyed by vandals, respondent sought assistance from the Ladue Police Department. She was informed that her sign violated Ladue's anti-sign ordinance, which required a permit for the display of a sign. After unsuccessfully seeking a permit

from the Chief of Police and the Town Clerk, respondent appeared before the Ladue City Council on December 17, 1990 to request a permit. The permit was denied. On December 20, 1990, respondent commenced this litigation, seeking injunctive relief against the Ladue ordinance. On January 7, 1991, the district court granted preliminary injunctive relief. On January 21, 1991, Ladue enacted its current anti-sign ordinance. J.A.116-31. Respondent, who had replaced her lawn sign with an 8.5 x 11 inch sign in her second floor window reading "For Peace in the Gulf," was informed that her window sign violated the current Ladue ordinance. (A picture of the sign in respondent's window appears at J.A. 195.) After a hearing, the district court granted summary judgment and injunctive relief, holding Ladue's current ordinance unconstitutional on its face. *Gilleo v. City of Ladue*, 774 F.Supp. 1559-68 (E.D.Mo. 1991). The Eighth Circuit affirmed. 986 F.2d 1180 (8th Cir. 1993). This Court granted *certiorari* on October 4, 1993.

SUMMARY OF ARGUMENT

The display of posters, placards and symbols is among the oldest and most pervasive forms of human communication. Nevertheless, the City of Ladue, in the name of aesthetics, seeks to ban virtually all non-commercial signs and symbols, even when they are displayed on private residential property. Such an exercise in mass censorship violates four fundamental constitutional precepts. First, a quixotic effort to ban the display of virtually all private signs and symbols from a community inevitably invites viewpoint-driven judgments about whether, when and how to enforce it. *Houston v. Hill*, 482 U.S. 451 (1987). Given the foibles of human nature, the limits of municipal resources and the pervasive presence of written communication through signs and symbols in our society, a purported ban on all signs and symbols must inevitably degenerate into a viewpoint-

driven series of judgments over the administration and enforcement of the ban. *See infra*, Point I at pp.7-11.

Second, Ladue's asserted interest in aesthetics cannot justify a total ban on a medium of communication as long-established and pervasive as the display of signs and symbols on private property. Ladue's effort to justify its total ban on aesthetic grounds fails on at least four levels:

> (a) an interest in aesthetics is not of sufficient magnitude to warrant the complete elimination (as opposed to regulation) of a long-established and pervasive medium of communication. *Schneider v. New Jersey*, 308 U.S. 147 (1939). *See infra*, Point II(A) at pp.13-17;
>
> (b) no showing has been made that the sign in question poses a genuine danger to any rational conception of aesthetics. At most, Ladue cites wholly speculative fears of a "risk" that unsightly signs will "proliferate" uncontrollably if any signs are permitted at all. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See infra*, Point II(B) at pp.17-20;
>
> (c) obvious less drastic means exist to guard against Ladue's bogeyman of uncontrolled sign proliferation. Ladue has made absolutely no effort to show that limits on the size, duration, format and number of signs would be ineffective in guarding against any rational conception of aesthetic degradation. *Sable Communications v. FCC*, 492 U.S. 115 (1989). *See infra*, Point II(C) at pp.20-21; and
>
> (d) even if Ladue's effort to stamp out an entire medium of communication is incorrectly analyzed as a mere "time, place or manner" regulation, it unquestionably fails the "narrow tailoring" test imposed in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). More importantly, though, Ladue's effort to ban a long-established and pervasive medium of communication exercises far too drastic an impact on the free flow of ideas to qualify for relaxed scrutiny as a time, place or manner rule. Banning books to save trees would not qualify as a time, place or manner rule. Neither does banning virtually all signs in the name of aesthetics. *See infra*, Point II(D) at pp. 21-23.

Third, Ladue's ordinance impermissibly discriminates on the basis of content by explicitly permitting commercial "For Sale" and "For Rent" signs, while forbidding identical signs containing non-commercial messages and by forbidding non-commercial messages in areas where commercial signs are freely permitted. The speculative assertion that commercial speech may be less likely to pose a threat to aesthetics because it is less likely to "proliferate" than its non-commercial cousin cannot justify such differential treatment of the two categories of speech. *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505. *See infra*, Point III at pp.24-26.

Finally, Ladue's ordinance impermissibly interferes with a property owner's right to use private property for communicative purposes. Whatever the State's power to regulate its own property, or property held for the common use of the public, the State must establish an overwhelming social need before overriding the combined effect of the two most important protections of human autonomy present in the Constitution -- free expression and private property. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). When, as here, a municipality ignores both free expression and private property by attempting to ban the display of innocuous signs on a homeowner's lawn and on the inside of a homeowner's window, it enters the realm of Orwellian fantasy. *See infra*, Point IV at pp.26-28.

ARGUMENT

The City of Ladue, in the name of community beautification, seeks to impose a flat ban on the display of virtually all private signs and symbols.[1] The extraordinary reach of Ladue's crusade to make its world safe from signs is demonstrated by the City's effort in this case to ban an 8.5 x 11 inch hand-lettered sign displayed in the second-floor front window of a resident's home reading "For Peace in the Gulf."[2]

Ladue's effort to eliminate the display of signs and symbols is unconstitutional on four grounds. First, a quixotic effort to ban virtually all communication by signs and symbols from the life of a community inevitably invites impermissible viewpoint-driven judgments about whether, when and how to enforce it. Second, Ladue's asserted interest in aesthetics and the maintenance of property values cannot justify a total ban on a significant and long-established medium of communication.

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[1] Ladue's current anti-sign ordinance was enacted on January 21, 1991, and amended on February 25, 1991. It is reproduced in its entirety in the Joint Appendix at pp.116-31. It flatly forbids most signs, with the exception of municipal signs; road and driveway danger signs; health inspection signs; signs for churches, religious institutions and schools; identification signs for not-for-profit organizations; public transportation signs; signs advertising the sale or rental of real property; commercial signs in areas zoned for commercial use; signs at filling stations; and signs identifying safety hazards.

The version of Ladue's anti-sign ordinance in effect at the commencement of this litigation is set forth in the Joint Appendix at pp. 26-37. It established a standardless permit system that clearly violated *Lovell v. Griffin*, 303 U.S. 444 (1938), and its substantial progeny. *See Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The petty tyranny of Ladue's viewpoint-driven refusal to grant a permit for respondent's original sign graphically illustrates the wisdom of this Court's repeated invalidation of standardless permit systems in the First Amendment area.

[2] Respondent's sign in her window was carefully covered by Ladue's current ordinance. *See* J.A.120-21.

Third, Ladue's ordinance impermissibly discriminates on the basis of content by permitting commercial "For Sale" signs, while forbidding identical signs containing non-commercial messages. Finally, Ladue's ordinance impermissibly interferes with a speaker's right to use private property for communicative purposes.

I. LADUE'S ATTEMPT TO IMPOSE A TOTAL BAN ON THE DISPLAY OF VIRTUALLY ALL SIGNS AND SYMBOLS ON PRIVATE PROPERTY INEVITABLY INVITES VIEWPOINT-DRIVEN JUDGMENTS GOVERNING ITS ADMINISTRATION AND ENFORCEMENT

Censorship on the basis of viewpoint violates the core of the First Amendment. Stone, "Content Regulation and the First Amendment," 25 Wm. & Mary L.Rev. 189 (1983); Karst, "Equality as a Central Principle in the First Amendment," 43 U.Chi.L.Rev. 20 (1975). Accordingly, this Court has consistently condemned speech regulations that invite viewpoint-driven judgments concerning enforcement and administration. *Police Department v. Mosley*, 408 U.S. 92 (1972). Statutes overtly discriminating on the basis of viewpoint are unconstitutional on their face. *Schacht v. United States*, 398 U.S. 58 (1970); *Boos v. Barry*, 485 U.S. 312 (1987); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. ___, 112 S.Ct. 501 (1991); *R.A.V. v. City of St. Paul*, 505 U.S. ___, 112 S.Ct. 2538 (1992). Standardless permit systems are similarly unconstitutional on their face because they delegate *de facto* power to censor on the basis of viewpoint. *Lovell v. Griffin*, 303 U.S. 444; *Schneider v. New Jersey*, 308 U.S. 147; *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750. Vague statutes in the First Amendment area are also unconstitutional on their face because they vest enforcement officials with discretion to discriminate on the basis of viewpoint.

Smith v. Goguen, 415 U.S. 566 (1974). *See* Amsterdam, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U.Pa.L.Rev. 67 (1960). Finally, overbroad statutes purporting to ban both protected and unprotected communicative activity are unconstitutional on their face precisely because they create an excessive risk of viewpoint-based application.[3] *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Houston v. Hill*, 482 U.S. 451. *See* Fallon, "Making Sense of Overbreadth," 100 Yale L.J. 853 (1991).

Ladue's attempt to ban the display of virtually all signs and symbols in a community likewise creates an excessive risk that viewpoint discrimination will play an impermissible role in its administration and enforcement. Despite Ladue's attempt to defend its massive exercise in censorship as a content-neutral exercise in city planning, the distasteful facts of this case reveal that a flat ban on communicating through signs inevitably lends itself to forbidden viewpoint censorship.

Respondent's original sign was initially the target of vandals,[4] and both signs were targets of municipal authorities,[5] because they conveyed a dissenting message that questioned American policy in the Persian Gulf. At

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[3] Since Ladue's ordinance may not be applied constitutionally against the sign at issue in this case, the ordinance is classically overbroad even if it may be applied constitutionally in other settings. Note, "The First Amendment Overbreadth Doctrine," 83 Harv.L.Rev. 844 (1970). The unconstitutionality of Ladue's ordinance as applied to respondent's sign is discussed *infra* at Point II.

[4] Respondent's first two efforts to post a small sign on her property protesting the war in the Persian Gulf fell victim to vandals who simply tore it down. After ascertaining the sign's content, the Ladue police rebuffed respondent's request for police protection, citing a predecessor ban on signs without a permit.

[5] Three levels of bureaucracy denied respondent a permit for her original sign under Ladue's predecessor ordinance after ascertaining its message.

the very moment Ladue's guardians of public order were denying respondent a permit because her small lawn sign allegedly posed a threat to the town's aesthetic purity, many of Ladue's residences and streets were emblazoned in yellow ribbons and American flags signifying support for our hostages abroad and for our military presence in the Persian Gulf.[6] Unlike their response to respondent's sign, however, Ladue's authorities made no effort to interfere with the widespread display of yellow ribbons to express symbolic support for the Gulf War, even though display of the ribbons, as "banners," "pennants" or "insignia," appears to fall within the definition of "sign" contained in both the predecessor and current ordinance. J.A.120 and J.A.26.[7] Indeed, an earlier, noncontroversial sign on respondent's property discussing environmental issues had remained undisturbed, both by neighborhood vandals and by municipal authorities alike. J.A.42-43. Finally, Ladue's Mayor candidly conceded that respondent's sign would have been less objectionable if it had read "Free the Hostages" or "Give Up Dope." J.A.55. Little doubt exists, therefore, that the "controversial" viewpoint espoused by respondent's original sign played a significant role in both private and public efforts to secure its elimination.

Recognizing that its predecessor ordinance was clearly unconstitutional because it was saturated with viewpoint-based judgments during the permit process, Ladue rescinded its permit system mid-way through this litigation and now argues that its current "absolute" anti-

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[6] *See* affidavit of Nancy Sachs, ¶¶9, 11 and 13. J.A.190-92.

[7] *Amicus* intends no criticism of Ladue's authorities for permitting the widespread display of yellow ribbons as political symbols. The display of symbols to express support for, or opposition to, government policy is fully protected by the First Amendment. *Texas v. Johnson*, 491 U.S. 397 (1989). It is the gross disparity between Ladue's toleration of symbols of support and suppression of signs of dissent that cannot be condoned.

sign ordinance is no longer vulnerable to viewpoint-driven abuse because it allegedly bans all signs regardless of subject matter.[8] But, given the breadth of Ladue's current ordinance, its administration and enforcement will inevitably be viewpoint-sensitive. Given the foibles of human nature, the limits of municipal resources and the pervasive presence of written communication through signs and symbols in our society,[9] a purported ban on all signs and symbols must inevitably degenerate into a viewpoint-driven series of judgments over which signs or symbols are brought to the attention of the authorities and whether scarce enforcement resources should be committed to stamping out, or protecting, a particular sign or symbol. Non-controversial signs and symbols espousing highly popular views, like the yellow ribbons supporting our troops in the Persian Gulf or the display of religious symbols, will continue to be tolerated, both by private vandals and by municipal authorities; while controversial signs, like respondent's, will continue to be brought to the attention of municipal authorities and aggressively suppressed.

In *Houston v. Hill*, 482 U.S. 451, this Court invalidated a similarly quixotic ban on all speech that interrupts a police officer in the performance of his or her duties. In words that could have been written for this case, Justice Brennan noted:

> The ordinance's plain language is admittedly violated scores of times daily, [yet] only some individuals -- those chosen by the police in their unguided discretion -- are arrested.

482 U.S. at 466-67. *See also id.* at 480-81 (Powell, J., concurring).

As in *Houston v. Hill*, the unavoidable impact of viewpoint on the administration and enforcement of Ladue's effort to ban virtually all signs and symbols from a community is the functional equivalent of granting a standardless licensing power to municipal authorities. By purporting to ban a long-established and pervasive form of communication, Ladue has simply replaced the clearly unconstitutional *de jure* permit system under its predecessor ordinance with an even more dangerous *de facto* permit system under the current ordinance. *See United States v. Reese*, 92 U.S. 214, 222 (1876). Whatever the face of the Ladue ordinance may recite, the reality is a *de facto* standardless licensing system that will tolerate yellow ribbons in support of government policy and suppress innocuous signs opposing it.[10]

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[8] In fact, Ladue's ordinance makes forbidden content distinctions between commercial "For Sale" signs and other identical signs, including non-commercial signs such as the sign at issue in this case. *See infra*, Point III. The invalidity of a total ban on signs is discussed in Point II.

[9] The display of signs and symbols is among the oldest and most pervasive forms of human communication:

> And you shall bind them as a sign between your eyes and write them on the doorposts of your house and upon your gates.

DEUTERONOMY, Chapter 6, verses 5-9.

Read literally, Ladue's ordinance bans the display of religious symbols on private property, even during the holiday season.

[10] The risk of viewpoint-based administration is enhanced by the fact that Ladue's ordinance is designed to advance an inherently subjective concept -- aesthetics. Certain officials of Ladue appear to believe that a single sign expressing support for a political candidate or cause is an aesthetic detriment, presumably because it is not a tree. Many others, including the Founders, would view evidence of community involvement in self-government as an aesthetic plus because it betokens a vibrant society. There may, of course, come a point where deteriorating or unsightly signs pose a consensus problem in aesthetics. But a belief that political signs are inherently inconsistent with aesthetics is untenable.

II. LADUE'S ASSERTED INTEREST IN AESTHETICS AND THE MAINTENANCE OF PROPERTY VALUES CANNOT JUSTIFY AN EFFORT TO ELIMINATE THE DISPLAY OF VIRTUALLY ALL SIGNS AND SYMBOLS FROM THE LIFE OF A COMMUNITY

When, as here, the government seeks to stamp out a significant and long-standing medium of communication, it must carry a heavy burden of justification on at least three issues. First, the State must demonstrate an interest in censorship that rivals our nation's historic commitment to free expression. Garden-variety preferences simply cannot justify massive censorship. *Schneider v. New Jersey*, 308 U.S. 147.

Second, the State must demonstrate that the target of its censorship is extraordinarily likely to harm the State's asserted interest. Mere speculation that the communicative activity at issue might lead to something worse can never suffice. *Brandenburg v. Ohio*, 395 U.S. 444.

Third, the State must show that less intrusive means of regulation will not equally advance its interests. Unnecessarily broad efforts at censorship violate the First Amendment. *Sable Communications v. FCC*, 492 U.S. 115.

Ladue's effort to eliminate signs as a significant medium of communication fails all three tests. In fact, the two versions of Ladue's anti-sign ordinance are classic examples of how not to regulate speech. The original ordinance sought to delegate *ad hoc* authority to draw lines to local enforcement officials, resulting in a standardless permit system. The current ordinance refuses to draw any lines at all, resulting in an unconstitutionally overbroad ordinance and a *de facto* permit system.

Despite Ladue's apparent aversion to the process, however, the careful drawing of lines is the key to any

serious effort to regulate speech. While the aesthetic problem of visual clutter may well justify thoughtful regulation of the format, number, size and location of certain signs, it cannot justify an overbroad effort to extirpate a significant and long-established medium of communication from the life of a community.

A. Ladue's Asserted Interest In Aesthetics Is Insufficient To Justify Massive Censorship Aimed At Eliminating The Display Of Signs And Symbols As A Significant Medium Of Communication

In order to justify an interference with free speech of a magnitude similar to Ladue's effort to ban virtually all private signs and symbols, government must seek to advance an interest that has been variously described as "compelling," "subordinating," "paramount," "cogent," "strong," "important," or "substantial." *See United States v. O'Brien*, 391 U.S. 367, 376-77, nn.22-27 (1968); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980). *Amicus* believes that the precise term used to describe the required quality of the State's interest is less important than a recognition that the interest must transcend the general run of concerns ordinarily motivating government. In adopting the First Amendment, the Founders balanced the ordinary concerns of government against the value of free expression and resoundingly endorsed free expression. Banning the display of virtually all signs and symbols on private property in the name of aesthetics fails to respect that foundational balance. *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975). Thus, even if Ladue's anti-sign ordinance could escape inevitable entanglement in viewpoint-driven judgments about whether and when to enforce it, the ordinance would, nevertheless, violate the First Amendment on its face because Ladue's asserted interest in aesthetics cannot justify a

flat ban on the type of sign at issue in this case.[11] Although aesthetics might well justify limits on the number, format, placement and size of certain signs in certain settings, an interest in community beautification simply cannot justify an effort to stamp out all signs, even the 8.5 x 11 inch sign in respondent's second floor front window announcing her opposition to the war in the Persian Gulf.[12]

Once before in the nation's history, municipal authorities sought to justify a complete ban on a significant and long-standing medium of communication -- leafletting -- by asserting an interest in the aesthetics of clean streets. In *Schneider v. New Jersey*, 308 U.S. 147, this Court soundly rejected the notion that aesthetics could justify the total elimination of a significant medium of communication from the life of a community, invalidating three municipal ordinances that imposed flat bans on leafletting in the name of clean streets. Indeed, in *Niemotko v. Maryland*, 340 U.S. 268, 276 (1951)(Frankfurter, J., concurring), Justice Frankfurter observed that the "easiest" free speech cases were those where a municipality sought to justify a ban on leafletting by asserting an aesthetic interest in clean streets. In words directly relevant to this case, Justice Frankfurter stated:

> The easiest cases have been those in which the only interest opposing free communication was that of keeping the streets of the community clean. This could scarcely justify prohibiting the dissemination of information by handbills or censoring their contents.

340 U.S. 268, 276 (1951).

The Ladue anti-sign ordinance is a modern variant of the anti-leafletting ordinances struck down in *Schneider*. Instead of leaflets, the target medium is signs. Instead of the aesthetics of clean streets, the municipal interest is the aesthetic avoidance of "visual clutter." But the balance between free speech and aesthetics is the same. *Schneider* and its progeny teach that aesthetics is simply not a sufficient basis for wiping out an entire medium of communication. Thus, while cases like *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); and *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), suggest that aesthetics may justify the regulation of various forms of communication, nothing in this Court's free speech jurisprudence supports the proposition that aesthetics can justify the virtual elimination of a significant and long-standing medium of communication from the life of a community.

City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, provides no support for the total elimination of signs as a significant medium of communication. The

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[11] Since Ladue's ordinance may not be applied constitutionally to respondent's sign, it is unconstitutional both as applied and on its face as classically overbroad, since it sweeps both protected and unprotected communication within its ambit. *Houston v. Hill*, 482 U.S. 451. Given the overbreadth in the very definition of "sign," J.A.120, it is impossible, despite the presence of a severability clause, to parse Ladue's ordinance to separate the valid from the invalid provisions. The existence of a severability clause is not a warrant to the courts to re-write the statute's core definitional sections.

[12] In addition to the Eighth Circuit below, the lower federal courts have unanimously invalidated similar efforts to ban the display of all signs on private property. *Arlington County Rep. Comm. v. Arlington, Va.*, 983 F.2d 587 (4th Cir. 1993); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *National Advertising Co. v. Town of Niagara*, 942 F.2d 145 (2d Cir. 1991); *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988); *Whitton v. City of Gladstone*, 832 F.Supp. 1329 (W.D.Mo. 1993); *City of Antioch v. Candidates' Outdoor Graphics Svc.*, 557 F.Supp. 52 (N.D.Cal. 1982); *Loftus v. Township of Lawrence Park*, 764 F.Supp. 354 (W.D.Pa. 1991). *See also Baldwin v. City of Redwood*, 540 F.2d 1360 (9th Cir.), *cert. den. sub nom. Leipig v. Baldwin*, 431 U.S. 913 (1977); *Aiona v. Pai*, 516 F.2d 892 (9th Cir. 1975); *Orazio v. Town of Hempstead*, 426 F.Supp. 1144 (E.D.N.Y. 1977).

Los Angeles ordinance upheld in *Taxpayers for Vincent* banned signs from *public* property on aesthetic grounds, but explicitly declined to impose a ban on signs on *private* property. Justice Stevens, writing for the Court, recognized that a private property owner's self-interest would naturally guard against aesthetic degradation, making municipal regulation of signs on private property less necessary. Moreover, he noted that the widespread availability of signs on private property mitigated the impact of the Los Angeles regulation on the free flow of information. *Id.* at 811.

Nor does *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, support a flat ban on all signs in the name of community beautification. The plurality opinion in *Metromedia* carefully confined that case to the regulation of large permanent billboards that are the equivalent of structures.[13] Nothing in *Metromedia* suggests that all signs may be totally banned merely because some large billboards may be regulated.[14]

Finally, *Renton* was explicitly premised on a finding that the municipal zoning regulation at issue in that case left over 520 acres available for the speech in question. 475 U.S. at 53-54. The non-intrusive zoning rules at issue in *Renton* are a far cry from Ladue's effort to impose a flat ban on an entire medium of communication. *See Young v. American Mini Theaters*, 427 U.S. 50, 71, n.35 (1976).

Indeed, in the years since *Schneider v. New Jersey*, this Court has repeatedly refused to permit aesthetic disapproval to justify censorship. For example, in *Cohen v. California*, 403 U.S. 15, Justice Harlan, writing for the Court, held that vulgar language could not be banned merely because it offended hearers:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours . . . . To many, the immediate consequences of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance . . . . [But] that the air may at times be filled with verbal cacophony is . . . not a sign of weakness but of strength.

403 U.S. at 24-25. *See also Erzoznik v. City of Jacksonville*, 422 U.S. at 210-11.

Thus, Ladue's asserted interest in aesthetics simply cannot justify censorship of the sweep imposed by a flat ban on virtually all signs wherever located.

B. Ladue's Assertion That Permitting Signs Similar To Respondent's Poses A Significant Risk Of Aesthetic Degradation Through "Visual Clutter" Is Wholly Unsubstantiated

Even if aesthetics were a sufficiently weighty interest to justify Ladue's effort at mass censorship, Ladue must demonstrate that respondent's sign actually poses a genuine threat of "visual clutter" before suppressing it. Mere speculative fear or "undifferentiated apprehension" cannot suffice. *Brandenburg v. Ohio*, 395 U.S. 444;

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[13] The California Supreme Court definitively construed the San Diego ordinance narrowly to prevent its application to "a small sign placed in one's front yard proclaiming a political or religious message." 453 U.S. at 494, n.2.

In fact, the categorical content distinctions drawn by the Ladue ordinance between commercial and non-commercial speech are virtually identical to the content-based distinctions that doomed the San Diego ordinance in *Metromedia*. *See infra* at pp.24-25 & n.19.

[14] In the years since *Metromedia*, this Court has repeatedly acknowledged the interest of hearers in receiving information. Given the importance of signs as a means of disseminating such information, *amicus* does not believe that aesthetics can justify a total ban even on large permanent signs, as opposed to their thoughtful regulation.

Tinker v. Des Moines Indep. Community School Board, 393 U.S. 503, 508 (1969).

One of Justice Holmes' great gifts to the nation was his recognition that speech may not be suppressed merely because it *may* pose a threat to a government interest. Prior to Justice Holmes, government was permitted to justify censorship by showing that a particular form of communication had a "bad tendency" to impair a significant government interest. *Gitlow v. New York*, 268 U.S. 652 (1925). Justice Holmes' seminal free speech opinions reject the "bad tendency" test and establish that government must prove that the target speech actually poses an imminent threat to the asserted government interest. *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616, 624 (1919)(Holmes and Brandeis, JJ., dissenting); *Gitlow v. New York*, 268 U.S. at 672 (Holmes and Brandeis, JJ dissenting). *Whitney v. California*, 274 U.S. 357, 372 (1927)(Brandeis and Holmes, JJ., concurring). *See* Strong, "Fifty Years of 'Clear and Present Danger': From *Schenck* to *Brandenburg*," 1969 Sup.Ct.Rev. 41. Speculative fear that the speech in question may lead to something worse can never justify censorship of the sweep attempted by the Ladue ordinance. *Edenfield v. Fane*, 507 U.S. ___, 113 S.Ct. 1792 (1993).

Since it would border on the absurd to claim that a small hand-lettered sign in a second floor window is itself an aesthetic threat, petitioners seek to defend a total ban on signs by speculating that unsightly signs will proliferate uncontrollably unless even the most innocuous signs are completely banned. In support of that dubious assumption, petitioners presented the affidavit of a single witness -- Malcolm Drummond, a city planner. J.A.138-59. Mr. Drummond described Ladue's requirement of three-acre residential zoning, recounted Ladue's refusal to permit apartment houses, and noted that less than 5% of the total land mass of Ladue is occupied by structures. The remaining 95% is parkland, or private grounds surrounding residences with larger than normal set-backs. While Mr. Drummond opined that the "careful regulation" of "signage" is an "essential element of city planning," he carefully refrained from urging a complete prohibition on signs. Read most generously for petitioners, Mr. Drummond's affidavit warns that signs with no "natural limit on number or duration" create a "risk" of proliferation causing visual blight. J.A.154. Basing widespread censorship on such a speculative assessment of "risk" is precisely the evil that Justice Holmes sought to avoid in *Gitlow* and precisely the type of "undifferentiated apprehension" condemned in *Tinker* and *Brandenburg*.

Moreover, Ladue's assumption that, unless all signs are banned, unsightly signs will sprout like mushrooms throughout the city faces two insurmountable objections. First, in *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, Cincinnati abandoned as untenable a virtually identical speculative fear of proliferation as a justification for censorship. *Id.* at 1515. In *Discovery Network*, Cincinnati had sought to defend its ban on commercial newsracks by arguing that commercial newsracks were especially prone to proliferate. After the Sixth Circuit commented scathingly on its proliferation argument, 946 F.2d at 466-67, Cincinnati did not even attempt it in this Court. Cincinnati recognized that fear of uncontrollable proliferation was speculative and, in any event, could not justify a total ban on all commercial newsracks. In fact, Ladue's "proliferation" argument is much weaker than Cincinnati's.[15] With more than 2,000 newsracks on its streets, Cincinnati was arguably at a saturation point that

[15] The Eighth Circuit commented on the weakness of petitioners' argument that non-commercial signs are subject to uncontrolled proliferation. 986 F.2d at 1183, n.7.

would have made fear of proliferation a credible concern. As the Drummond affidavit demonstrates, however, the display of an occasional sign on a lawn or in a window is hardly an imminent aesthetic threat in a city 95% of which consists of well-manicured parkland and spacious private grounds.

Second, as Justice Stevens noted in *Taxpayers for Vincent*, owners of private property, especially residential property, have a powerful motive to care about the aesthetics of their property. Accordingly, he reasoned, it was unnecessary to forbid signs on private property to guard against runaway visual blight. In the three years that Ladue has operated under court order without a ban on signs,[16] Ladue's citizens have behaved exactly as Justice Stevens predicted. Occasional signs are displayed, expressing a deeply felt idea; but there is no evidence whatever that uncontrolled proliferation has given rise to visual blight anywhere but in the overheated imaginations of Ladue's officialdom.

C. Ladue's Asserted Interest In Stemming Visual Blight Does Not Require A Total Ban On Signs. Reasonable Regulation Of The Number, Format, Size And Duration Of Signs Is An Obvious Less Drastic Means Of Advancing Ladue's Asserted Aesthetic Interest

Where, as here, obvious alternatives exist that would fully protect the government's asserted interest without resorting to unnecessary censorship, the First Amendment requires use of the less drastic alternative. *Martin v. Struthers*, 319 U.S. 141 (1943); *Sable Communications v. FCC*, 492 U.S. 115; *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990). While disputes have arisen over whether an alleged alternative is an equally effective means of advancing the government's interest,[17] no doubt exists in this case that thoughtful regulation, as opposed to total prohibition, is an adequate defense against the bogeyman of uncontrolled proliferation of unsightly signs. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. __, 112 S.Ct. 2709, 2711 (O'Connor, J.), 2715 (Kennedy, J.), 2724 (Souter, J.)(1992).

D. Ladue's Effort To Impose A Total Ban On Virtually All Private Signs Cannot Be Defended As A "Time, Place Or Manner" Regulation

Recognizing that its ordinance cannot survive traditional First Amendment scrutiny, Ladue attempts to invoke the less stringent review applied to time, place or manner restrictions. *United States v. O'Brien*, 391 U.S. 367; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781. The short answer to petitioners' effort to seek shelter in the time, place and manner doctrine is that even time, place and manner rules must be "narrowly tailored" to avoid unnecessary interference with free speech. As Justice Kennedy observed for the Court in *Rock Against Racism*:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place or manner of protected speech must

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[16] Ladue's anti-sign ordinance has been judicially suspended since January 7, 1991.

[17] *Compare Board of Trustees v. Fox*, 492 U.S. 469 (1989)(no need for "perfect" fit between means and ends; "reasonable fit sufficient) *with Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (government must show that its interest cannot be protected adequately by more limited regulation of appellant's speech).

> be narrowly tailored to serve the government's legitimate content-neutral interests, but that it need not be the least-restrictive or least-intrusive means of doing so . . . . To be sure, this standard does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Id. at 798-99.

Indeed, in words that are particularly applicable to this case, Justice Kennedy concluded:

> A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion or noise. For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it.

491 U.S. at 799, n.7.

Substitute the word "signs" for the word "handbilling" and Justice Kennedy was deciding this case.

Even more importantly, however, Ladue's flat ban on the display of signs and symbols on private property is not a mere time, place or manner restriction. Censorship of such sweep, aimed at virtually eliminating a long-established and pervasive medium of communication, must satisfy rigorous First Amendment standards. Nothing in the Court's free speech jurisprudence suggests that a regulation aimed at eliminating one of our most significant and pervasive forms of communication should be

tested under relaxed standards. If, for example, Ladue sought to ban books in order to save paper, its attempt at censorship would not be viewed as a mere time, place or manner rule. The dramatic impact on free speech of such an attempt to ban a long-established medium of communication would require it to pass rigorous First Amendment scrutiny. Instead of books, Ladue has banned signs. While the justifications for banning books and signs may vary, the rigorous First Amendment standard of review does not.

In order to qualify as a time, place or manner rule, a speech regulation must permit the speech in question *some* time, *some* place, or *some* manner. From the inception of the doctrine in *Cox v. New Hampshire*, 312 U.S. 569 (1941), through its refinement in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), to its current application in *Ward v. Rock Against Racism*, 491 U.S. 781, the doctrine has been used to regulate the geography of speech and to assure that unconventional means of communication did not cause undue dislocation to other important governmental interests. But the fundamental assumption underlying the slightly relaxed rules governing time, place or manner regulations is that such regulations do not pose a significant impediment to the free flow of ideas. The time, place or manner doctrine has no place, therefore, in the analysis of an attempt to eliminate an entire medium of communication.[18]

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[18] Petitioners' efforts to show that alternative forms of speech were available to respondent are, thus, irrelevant. If Ladue outlawed books instead of signs, the fact that alternative means of communication were alleged to exist could not be a defense to such a drastic interference with free expression.

Moreover, it is obvious that the alleged alternative means of communication trumpeted by petitioners are fundamentally different in nature and quality. Requiring respondent to phone all of her neighbors, or to put material in their mailboxes, is hardly an adequate al-

(continued...)

III. LADUE'S ORDINANCE MAKES IMPERMISSIBLE CONTENT-BASED DISTINCTIONS BETWEEN COMMERCIAL AND NON-COMMERCIAL SPEECH

Even if aesthetics were a sufficient basis for eliminating all signs, Ladue's ordinance does not purport to eliminate all signs. It explicitly permits commercial "For Sale" or "For Rent" signs (but not non-commercial signs like respondent's) in residential neighborhoods and permits commercial signs, but not non-commercial signs, in commercial areas. Thus, Ladue makes precisely the content-based distinction between commercial and non-commercial speech that doomed the ordinance in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, and makes the obverse of the distinction that doomed the ordinance in *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505.

In *Metromedia*, a plurality[19] of the Court voted to invalidate a San Diego ordinance regulating billboards because the ordinance discriminated against non-commercial speech. The aversion to content-based discrimination that motivated the *Metromedia* plurality ripened into a cogent theory in *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505. In *Discovery Network*, Cincinnati attempted to ban commercial newsracks while permitting newspapers unlimited access to the medium. Cincinnati argued that commercial speech was less important than newspapers and, thus, could be differentially treated in the interest of aesthetics and public safety. Justice Stevens, writing for the Court, rejected Cincinnati's attempt to discriminate against commercial speech, reasoning that the City's asserted interest in aesthetics and public safety did not justify differential treatment of commercial and non-commercial speech.

This case is the obverse of *Discovery Network*. Instead of discriminating against commercial speech, as in *Discovery Network*, Ladue discriminates in favor of it. As in both *Discovery Network* and *Metromedia*, however, Ladue's asserted interest in regulation -- aesthetics -- does not support differential treatment of commercial and non-commercial speech. No intrinsic aesthetic difference exists between identical signs expressing commercial or non-commercial messages. Ladue concedes that obvious truth; but argues that non-commercial signs are more likely to "proliferate" uncontrollably. However, both commercial and non-commercial signs are equally amenable to regulation as to number, size, duration and location. Thus, as in *Discovery Network*, no reasonable

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[18] (...continued)
ternative to the display of a sign or symbol. The display of signs and symbols evolved as significant medium of communication precisely because it differs from verbal or individually directed written speech.

The existence of alternative means of expression, as used in time, place or manner analysis, means alternatives of the same nature and quality as the forbidden expression. Thus, in *Taxpayers for Vincent*, the alternatives included identical signs on private property. In *Clark v. Community for Creative Non-Violence*, the alternatives included identical demonstrations in the park. In *Rock Against Racism*, the alternatives included the very music at issue. In *Renton*, the alternatives included the identical speech at a different geographical location. Conversely, the alleged existence of alternative forms of communication have been deemed irrelevant when they are of a different quality and nature than the communication at issue. *E.g., Texas v. Johnson*, 491 U.S. 397 (alternatives to flag-burning); *Cohen v. California*, 403 U.S. 15 (alternative to vulgar language).

[19] Justice White delivered the plurality opinion in *Metromedia*, joined by Justices Stewart, Marshall and Powell, condemning the discrimina- (continued...)

[19] (...continued)
tion against non-commercial speech. 453 U.S. at 512-17. Justices Brennan and Blackmun voted to invalidate the ordinance because it constituted a *de facto* total ban that had not been adequately justified. *Id.* at 521. Chief Justice Burger, (*id.* at 554), Justice Rehnquist, (*id.* at 568), and Justice Stevens, (*id.* at 539), voted to uphold the ordinance.

linkage exists between the government interest in censorship and the decision to treat commercial and non-commercial speech differently.

In the absence of a persuasive, non-speculative functional justification for differential treatment, the decision to treat commercial speech better or worse than its non-commercial cousin turns on a forbidden subjective judgment about the relative "importance" or "value" of categories of protected expression. As Justice Powell repeatedly warned, however, the First Amendment places judgments about the relative value of different categories of speech in the private marketplace of ideas, not in the hands of a government regulator. *Young v. American Mini Theaters*, 427 U.S. at 82, n.6 (Powell, J. concurring); *FCC v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) (Powell, J. concurring). Although the short term interests of commercial speakers might be enhanced by seeking privileged treatment at the expense of non-commercial speakers, the long-term interests of the First Amendment demand content-neutrality in the absence of a powerful functional justification for treating one category of speech more favorably than another. Since no reason exists to treat commercial and non-commercial speech differently on aesthetic grounds, Ladue's ordinance is in clear violation of *Discovery Network*.

IV. LADUE'S EFFORT TO BAN THE DISPLAY OF SIGNS AND SYMBOLS ON PRIVATE PROPERTY VIOLATES THE RIGHT OF A PROPERTY OWNER TO USE PRIVATE PROPERTY FOR COMMUNICATIVE PURPOSES

Whatever power the State may possess to regulate the communicative use of its own property,[20] or to impose restrictions on public property held for common use,[21] government power is at its lowest ebb when it seeks to forbid the use of private property for expressive use. Whether the context has been regulation of the electoral process, *Buckley v. Valeo*, 424 U.S. 1; regulation of public utilities, *Pacific Gas & Elec. v. Public Utilities Comm'n*, 475 U.S. 1 (1986); enforcement of the criminal law, *Stanley v. Georgia*, 394 U.S. 557 (1969); motor vehicle regulation, *Wooley v. Maynard*, 430 U.S. 705 (1977); postal regulation, *Lamont v. Postmaster General*, 381 U.S. 301 (1965); zoning, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); newspapers, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); regulation of public television, *FCC v. League of Women Voters*, 468 U.S. 364; flag usage, *Spence v. Washington*, 418 U.S. 405 (1974), and *Texas v. Johnson*, 491 U.S. 397; regulation of corporations, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); or commercial speech, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, this Court has consistently upheld the right of a property owner to utilize private property for expressive ends.[22] And when, as

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[20] *See United States v. O'Brien*, 391 U.S. 367 (draft cards); *Greer v. Spock*, 424 U.S. 828 (1976)(military base); *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)(mail boxes); *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)(telephone poles); *Rust v. Sullivan*, 500 U.S. ___, 111 S.Ct. 1759 (1991)(use of public funds); *United States v. Kokinda*, 497 U.S. 720 (1990)(postal property). (...continued)

[21] *Compare Clark v. Community for Creative Non-Violence*, 468 U.S. 288; *Ward v. Rock Against Racism*, 491 U.S. 781; and *Burson v. Freeman*, 504 U.S. __, 112 S.Ct. 1846 (1992); *with Lee v. Society of Krishna Consciousness Inc.*, 112 S.Ct. 2709; *Frisby v. Schultz*, 487 U.S. 474 (1988); *United States v. Grace*, 461 U.S. 171 (1983); and *Hague v. CIO*, 307 U.S. 496 (1939).

[22] The Court has recognized the correlative right of a property owner to refrain from using his property for communicative purposes. *Wooley v. Maynard*, 430 U.S. 705.

here, the private property is residential, the right is at its strongest. *Stanley v. Georgia*, 394 U.S. 557; *Moore v. City of East Cleveland*, 431 U.S. 494. *But see City of Ladue v. Joan K. Horn and Terrence Jones*, 720 S.W.2d 745 (Mo. Ct.App. 1986)(enforcement of Ladue's anti-cohabitation ordinance against member of Congress who lived with unmarried partner and children).

The power of the private property-free expression combination should come as no surprise, since free expression and private property are the principal guarantees of individual autonomy contained in the Constitution. When the two concepts pull in different directions, the Court is confronted with the extremely difficult task of choosing between the two. *E.g,. Marsh v. Alabama*, 326 U.S. 501 (1946); *Lloyd Corporation v. Tanner*, 497 U.S. 551 (1972); *Pruneyard Shopping Center v. Robins*, 447 U.S. (1980). But where, as here, the two concepts overlap and reinforce each other, the combined force of both can be breached by the government, if at all, only upon a showing of extraordinary social need that far transcends Ladue's "undifferentiated apprehension" that the display of any signs at all inevitably leads to aesthetic degradation.

CONCLUSION

For the above-stated reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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